

No. 17458 ✓

United States  
Court of Appeals  
for the Ninth Circuit.

MARY M. BEHRENS,

Appellant,

v

UNITED STATES OF AMERICA, WILDA L. DINNELL,

Appellees.

APPELLANTS' OPENING BRIEF

LERRIGO, THUESEN & THOMPSON  
BY: MAURICE E. SMITH  
804 Security Bank Bldg.  
Fresno, California  
Attorneys for Appellant



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APPELLANTS' OPENING BRIEF

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I

STATEMENT OF PLEADINGS AND FACTS, SHOWING  
COURT'S JURISDICTION.

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This cause arises to jurisdiction of the District Court under § 19 of the World War Veterans' Act of 1924, as Amended, [45 Statutes 964; 38 U.S.C.A. 445], which is





incorporated by reference in § 617 of the National Service Life Insurance Act of 1940, as Amended [54 Statutes 1014; 38 U.S.C.A. 817; also 38 U.S.C. 784].

The jurisdiction of the United States Court of Appeals, Ninth District, comes upon the review of the judgment of the District Court, Southern District of California, Northern Division, entered May 15, 1961, upon the Order for Judgment executed by the Court March 9, 1961, and upon Findings of Fact and Conclusions of Law executed by the Court May 15, 1961.

## II

### STATEMENT OF THE CASE

This is an action involving the disposition of proceeds of a deceased serviceman's policy of National Service Life Insurance. The plaintiff herein is the beneficiary under Policy No. V1426-22-92, National Service Life Insurance, and the holder of said policy. Co-defendant Wilda Dinnell claims as beneficiary thereunder on grounds of intent of serviceman that she become the beneficiary.

The sole question involved is whether there was accomplished a change of beneficiary of said policy of National Service Life Insurance.

The question is raised in that the entire record of

Journal of the American Chemical Society  
Vol. 71, No. 1, p. 1-10  
1949

The following is a list of the authors of the papers published in this issue:

1. R. M. Waymouth, J. H. Goldstein, and R. W. Parry, "The Kinetics of the Reaction of Nitrogen Dioxide with Ethylene Oxide," p. 1.

2. R. M. Waymouth, J. H. Goldstein, and R. W. Parry, "The Kinetics of the Reaction of Nitrogen Dioxide with Ethylene Oxide," p. 1.

3. R. M. Waymouth, J. H. Goldstein, and R. W. Parry, "The Kinetics of the Reaction of Nitrogen Dioxide with Ethylene Oxide," p. 1.

4. R. M. Waymouth, J. H. Goldstein, and R. W. Parry, "The Kinetics of the Reaction of Nitrogen Dioxide with Ethylene Oxide," p. 1.

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the serviceman in the hands of the Veterans Administration was presented by stipulation to the Court, and no other factual or evidentiary evidence was taken. The trial Court concluded from the record (the entirety thereof being raised and presented to the Appellate Court), that plaintiff is the named beneficiary, but that the serviceman intended to change the beneficiary thereunder, and that such intention alone is sufficient under the law to accomplish a change of beneficiary.

### III

#### ERRORS URGED

1. That the United States District Court, Southern District of California, Northern Division, erred in the Finding of Fact No. III, and that said Finding should have read:

"That the said Henry Dinnell in April, 1952, obtained a decree of divorce from the said Mary M. Dinnell; that on December 31, 1952, the said Henry Dinnell entered into a marriage with the defendant, Wilda L. Dinnell, at Rantoul, County of Champaign, State of Illinois; that said Henry Dinnell thereafter did not change the beneficiary on said policy of insurance and the named beneficiary thereunder at all times remained Mary M. Dinnell; that on October 25, 1954, the said Henry Dinnell did

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executed United States Air Force Form DD 93, Record of Emergency Data, designating the said Wilda L. Dinnell 'receive each month 100% of my pay' and the said Wilda L. Dinnell be designated to receive 100% of serviceman's indemnity under Public Law 23 of the 82nd Congress (gratuity pay and benefits); that said DD Form 93 specifically states: 'Does not operate as a designation or a change of beneficiary of any insurance contracts issued by the United States Government;' that on April 10, 1956, said Henry Dinnell did execute another U.S.A.F. DD 93 Data Form wherein and whereby the said Henry Dinnell did designate said Wilda Lee Dinnell as beneficiary 'for the unpaid pay and allowance (Public Law 147, 84th Congress)' as person to be notified in case of emergency, as beneficiary for gratuity pay, and as person to receive personal effects for safekeeping; that said U.S.A.F. Form DD 93 (Record of Emergency Data) specifically states therein by specific insertion typewritten, 'not applicable to National Service Life Insurance'; that at the date of the death of the said Henry Dinnell on March 23, 1957, the sole beneficiary under the said policy of insurance was and is the named beneficiary, Mary M. Dinnell; that the said Henry Dinnell specifically intended to leave the said named beneficiary, Mary



M. Dinnell, on said policy of insurance; that the said Henry Dinnell specifically made each DD Form 93 not applicable to National Service Life Insurance beneficiary."

That specifically, the error of the said Finding is that the said dependency form (DD Form 93) specifically applies only to the designation of benefits of survivors and dependants, and specifically states thereon that it is not applicable to change of beneficiaries of National Service Life Insurance, and that the said deceased serviceman, being an Army company clerk, and First Sergeant for more than 15 years, specifically wrote upon said dependency form (Form DD 93): "Not applicable to National Service Life Insurance".

2. That the United States District Court, Southern District of California, Northern Division, erred in Conclusion of Law No. I, and that said Conclusion should have read:

"That plaintiff Mary M. Behrens is the named beneficiary under said policy of insurance and is entitled to the proceeds thereof.",

for the same reasons, as assigned immediately above.





ARGUMENT

FACTS: This case was submitted to the trial Court upon the voluminous records of the Veterans Administration, which also includes the service record of the deceased serviceman, Henry L. Dinnell, all of which has been referred up to the Appellate Court, and reveal the following pertinent information:

Henry Dinnell, the deceased serviceman, had almost continuous active military service from 1940 until the date of his death on the 23rd of March, 1957. He first married Lillian Dinnell, in 1928, and had by her two children, Billy Jo and Patsy Ruth. He divorced Lillian March 23, 1944, and married the plaintiff, Mary Dinnell, October 28, 1944; that he divorced the plaintiff April 23, 1952, and married the defendant Wilda Dinnell December 30, 1952; that during the course of the marriage of the plaintiff to the serviceman, and continuing thereafter, the plaintiff and the serviceman and his children and family and mother were very close; that plaintiff took care of his mother, and still continues intimate relations with her, through visits and correspondence. The serviceman remained close to plaintiff's family after the divorce, and made visits to near the time of his death (October 1956); that from time to time the serviceman executed properly change of beneficiaries, both



primary and secondary; that he was completely familiar with the necessity and the forms therefor; the record reveals these changes were made upon Veterans' Administration forms, not DD forms. [VA Form 9-336]. The record reveals that each time the change of the contingent beneficiary and the primary beneficiary was made, the serviceman executed these forms. That almost five years passed from the time of the divorce of the plaintiff to the death of the serviceman, with no effort on his part to change either the primary or contingent beneficiaries as he had in the past. Records reveal statements of the serviceman that he would never change the beneficiaries therefrom from his children and the woman that raised them. That on April 1, 1955, some three years after the divorce from plaintiff, the serviceman applied for and secured a renewal of said policy for another five-year term, and the same remained in full force and effect until the serviceman's death, and that the said renewal left plaintiff as beneficiary thereunder. That co-defendant Wilda Dinnell's sole claim of change of beneficiary arises out of the execution of a dependency designation form [DD Form 93] admittedly not executed until October 25, 1954, some two years after the deceased serviceman's marriage to her, coupled with letters discussing insurance, which plaintiff alleges to refer to



civil policies of insurance obtained by the serviceman and received by the co-defendant Wilda Dinnell. That in a letter dated December 13, 1956, to co-defendant Wilda Dinnell the serviceman stated: ".....I am sending you a copy of the new survivor's benefits and this new deal is better than insurance.....", and on December 28, 1956, his letter states: "I haven't heard from my insurance yet, so I don't know how much it will be." The record further reveals that in October, 1956, some two months prior to said letter, the serviceman indicated he would never change his insurance from the named beneficiaries.

Argument:

The mere execution of a dependency designation form [DD Form 93], noting the present wife as gratuity beneficiary, is insufficient to change the beneficiary of National Service Life Insurance [Coleman v United States, 176 Fed. (2d) 469].

Testimony that a deceased veteran had signed an application for change of beneficiary from sister to wife does not establish a change of beneficiary thereunder, where the records of the Veterans Administration showed no such change [Walson v United States, 185 Fed. (2d) 292; Kluge v United States, 206 Fed. (2d) 344].

Serviceman's divorce from a wife named as beneficiary

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in National Service Life Insurance policy would not, standing alone, work a change of beneficiary thereunder [Hawkins v Hawkins, 271 Fed. (2d) 870].

The case of Hawkins v Hawkins, supra, may prove valuable to the Court in the instant case, in that it contains a very similar factual situation. The case arose in the Fifth Circuit, upon an action brought by a deceased serviceman's then present wife against a former wife, who was the named beneficiary under a policy of National Service Life Insurance obtained August 1, 1950. In 1951, the serviceman divorced his then wife upon the grounds of adultery, and in 1954 married the plaintiff, and died in 1955. Subsequent to his marriage in 1954, the serviceman executed an Army AGO Form 41, (similar to Air Force Form DD 93), designating his then present wife (the plaintiff) the recipient of his gratuity pay, dependency benefits, etc. The Fifth Circuit Court reviewed an extensive history of cases containing similar factual situations, and concluded:

"We think it is plain that a careful reading of the cases from this circuit, as well as from the others, makes it clear that the sufficiency of the overt acts required is partially judged by the clarity and positiveness of the proof of intent. As was said by us in the first case cited, Mitchell v United States, supra, 165 F. 2d at page 761:





'.....It is said that a combination of intent and act is required, but to say in these insurance cases that though intention to change the beneficiary is proved to the hilt, no effective formal act having been done no change can be held to have been made, is not to brush technicalities very far aside.....'

"It is obvious that either clear and convincing proof of continuing intent or a clearly defined and unequivocal act seeking to make the change is necessary to prevent the frauds 'obviously latent in the situation if basic minima of proof be disregarded.' Cohn v Cohn, 84 U.S. App. D.C. 218; 171 F. 2d 828, 829."

In the case before this Honorable Court, plaintiff herein respectfully submits that a careful reading of the record indicates no overt act upon the serviceman's part. The serviceman here spent fifteen years in the orderly room, was fully cognizant of the method and act of change of beneficiaries of National Service Life Insurance, had made several changes, and in fact, the change of beneficiaries was part of his duties as a First Sergeant.

Careful consideration should be given by the Court in reversing the named beneficiaries either under a policy of insurance or a will. Many oral statements are made for their effect upon the listener, and are not carried out,



when the solemnification of written execution carries with it the careful thought required to remove as beneficiaries either from insurance or will one's own children and the woman that raised them. As was stated by the Court in Butler v Butler, 177 Fed. (2d) 471, at 472, in holding that the deceased veteran had not effectively changed the beneficiary:

"It is evident that the insured knew who was named as beneficiary in his policies, and failed to make any changes therein."

A scholarly review of a multitude of cases involving change of beneficiary under National Service Life Insurance is made in 2 A.L.R. (2d) 484, and a summary of those cases convinces the appellant herein that in order to execute a change of beneficiary under National Service Life Insurance "by intent", there must be "strong, almost incontrovertible, evidence, of an intention to change, coupled with an overt act directed toward the accomplishment of that intent, and a continuance of that intent to the time of death".

Appellant feels that the position of the Court is well-taken in preserving the sanctity of the execution of beneficiaries during well-considered period from change caused by hasty and oral promises, and the frailty of the G.I. in human emotions, making spontaneous promises and



declarations which would not be carried through or accomplished under the solemnity of the considered execution of written instruments.

Appellant therefore respectfully submits that a review of the facts and evidence in this case (the entirety thereof being raised on appeal), fails in legal sufficiency to support a holding overruling the solemnity of the naming of a beneficiary, and that the case should be reversed, with instructions to enter judgment for the plaintiff herein, the named beneficiary of the National Service Life Insurance policy herein set forth.

Respectfully submitted this 29th day of September, 1961.

LERRIGO, THUESEN & THOMPSON

BY: MAURICE E. SMITH

Attorneys for Appellant.

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